Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Establishment of Rules Governing Procedures To Be Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission	)	CI Docket No. 02-32
Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures To Be Followed When Informal Complaints Are Filed Against Common Carriers	)	CC Docket No. 94-93
2000 Biennial Regulatory Review	)	CC Docket No. 00-175

REPLY COMMENTS OF THE MEDIA INSTITUTE

Patrick D. Maines, President
Richard T. Kaplar, Vice President
THE MEDIA INSTITUTE
Suite 301
1000 Potomac Street, N.W.

Washington, DC 20007
Phone: 202-298-7512
Fax: 202-337-7092

May 29, 2002

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Establishment of Rules Governing Procedures To Be Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission	)	CI Docket No. 02-32
Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures To Be Followed When Informal Complaints Are Filed Against Common Carriers	)	CC Docket No. 94-93
2000 Biennial Regulatory Review	)	CC Docket No. 00-175

The Media Institute (TMI) is a nonprofit research foundation specializing in communications policy and First Amendment issues. TMI has long advocated a robust and dynamic press, a strong First Amendment, and a competitive communications industry. TMI hereby submits these Reply Comments in response to comments filed on the issue of streamlining the Commission's informal complaint process.[1]

[1] *Establishment of Rules Governing Procedures To Be Followed When Informal Complaints Are Filed by Consumers Against Entities Regulated by the Commission, CI Docket No. 02-32; Amendment of Subpart E of Chapter 1 of the Commission's Rules Governing Procedures To Be Followed When Informal Complaints Are Filed Against Common Carriers, CC Docket No. 94-93; 2000 Biennial Regulatory Review, CC Docket No. 00-175, Memorandum Opinion and Order and Notice of Proposed Rulemaking,* FCC 02-46 (rel. Feb. 28, 2002) (hereinafter "NPRM").

We are mindful that the Commission wishes to consolidate and simplify the current panoply of complaint procedures involving several bureaus and affecting myriad communications industries, both common carrier and non-common carrier. The primary beneficiary of this streamlining process would be the consumer, who presumably would be able to lodge informal complaints against any entity regulated by the Commission in a straightforward and user-friendly way. The key question thus becomes whether a streamlined complaints process could benefit the consumer without placing burdensome new regulatory requirements on regulated companies, or overtaxing Commission staff.

Common carriers would be least affected by the proposal outlined in the NPRM because the Section 208 informal complaint process presently in effect for common carriers would, with some modifications, serve as a model and be extended to other regulated industries.[2] The question arises as to whether all of those other industries would be availing of this same type of complaint procedure, owing to differences in their products and services and the nature of their relationship with their customers. Broadcasting, in particular, needs to be addressed in this light.

As the NPRM notes, common carriers and consumers typically have a direct contractual relationship.[3] Complaints frequently involve billing disputes and unauthorized changes of service providers ("slamming") for which the consumer seeks a refund or credit. We agree with the Commission and the National Association of Broadcasters (NAB)[4] that the situation for broadcasters is fundamentally different. Broadcasters have no contractual relationship with their audiences, and consumer complaints tend to focus on programming content, *e.g.*, allegations of indecent or obscene material or other objectionable content. Remedies sought tend to be directed not toward the complainant directly but at the broadcaster, *e.g.*, asking the Commission to "clean up" the offending programming, fine the station involved, revoke its license, or prohibit the broadcast of similar content in the future.

---

[2] *Id*. at para. 2, citing 47 C.F.R. Secs. 1.716-1.718.
[3] *Id*. at para. 7.
[4] Comments of the National Association of Broadcasters, May 16, 2002, at 5 (hereinafter "NAB Comments").

Moreover, the burden of proof is on the consumer to provide *prima facie* evidence that a broadcaster did indeed broadcast indecent or obscene material that would fall under the Commission's regulatory purview. This typically requires the consumer to furnish a tape or transcript of the programming in question -- a condition that no doubt has the effect of reducing the number of frivolous complaints. (Programming that is not indecent or obscene, but which some people find offensive nonetheless, is not subject to the Commission's statutory authority and such complaints are routinely dismissed.[5]) This background, in the context of comments already submitted by others (and in particular the NAB), leads us to offer suggestions on a number of points for the Commission's consideration.

Making the complaint process more user friendly should not change the fundamental nature of the process in the broadcasting context. It is one thing to give consumers a single 800 number or a prominent "complaints" icon on the Commission's Web page; it is another thing entirely to change the fundamentals of the process in a way that encourages frivolous complaints, overburdening FCC staff and broadcasters alike. It seems reasonable to us, for example, to keep the burden of proof on complainants by maintaining the requirement to furnish tapes or transcripts of allegedly indecent or obscene programming. In addition, we assume the Commission would continue to routinely dismiss complaints that contained insufficient information, were otherwise defective, or were outside the Commission's regulatory purview, without forwarding them to broadcasters and compelling a response. Forcing broadcasters to deal with such dubious complaints would impose an unwarranted administrative burden that would divert broadcasters' resources from other activities in the public interest, including replying to legitimate complaints.

A revised complaints procedure must not be an excuse to extend the Commission's regulatory authority. The Commission's regulatory powers are, for the most part, clearly spelled out and limited by statute -- as, for example, the Commission's ability to regulate indecent or obscene content, but not other content, even if crude or offen-

[5] For example, the Commission received numerous viewer complaints about "The Victoria's Secret Fashion Show" broadcast on ABC. But in March 2002 the Commission dismissed these complaints, finding that the "sexual aspects of the material" did not meet the criteria for indecency.

sive to some but not indecent. For instance, the NAB raises concerns that the proposed complaints process may encourage the Commission to extend its regulatory reach to a new category of so-called "objectionable" material that is neither indecent nor obscene.[6] Clearly there is no statutory authority for such content regulation, and the complaints process itself cannot be used as a "back door" means of broader regulation.

The Commission needs to be mindful of the First Amendment implications of a revised complaints process. In the NPRM, the Commission notes that in certain cases "voluntary action by the broadcaster, *e.g.*, a public apology for the airing of objectionable material, might resolve the complaint."[7] We understand the Commission to be suggesting a public apology here only as an example of a possible voluntary remedy that could satisfy a complaint before the matter reached the Commission. However, the Commission needs to be aware that even its offhand endorsement of a "public apology" as a "voluntary" form of complaint resolution is likely to be interpreted by broadcasters as signaling a type of "preferred" or "approved" speech. This quickly becomes a form of "forced voluntarism" or *de facto* coerced speech that is antithetical to the First Amendment. Any attempt to codify such a speech-intensive remedy as an element of the complaint resolution process would certainly face a First Amendment challenge. Moreover, a broadcaster wishing to avoid making a public apology (or, as the NAB puts it, "'apologize' for exercising its editorial discretion"[8]) may refrain from airing potentially controversial programming. This "chilling effect" on program content is also antithetical to the First Amendment.

A revised informal complaint process should not lead to a requirement that broadcasters tape all programming. If the proposed complaint process has the effect of shifting the burden of proof from complainant to broadcaster in matters of alleged indecent programming, broadcasters may be forced as a practical matter to keep program tapes to rebut such charges. However, the U.S. Court of Appeals for the District of Columbia Circuit struck down a taping requirement affecting public broadcasters in 1978, saying that the measure posed "the risk of direct governmental interference in program

[6] NAB Comments, *supra* note 4 at 13-16.
[7] NPRM, *supra* note 1 at para. 7.
[8] NAB Comments, *supra* note 4 at 5.

content."[9] In addition to this constitutional weakness, a mandatory or *de facto* taping requirement as part of the complaint process would place an unnecessary and unwieldy burden on broadcasters.

Conclusion. We applaud the Commission's desire to streamline and consolidate its informal complaint process, making it easier and less confusing for the consumer. However, care must be taken in attempting to extend the existing Section 208 complaint process for common carriers to other types of regulated industries, particularly broadcasters. In determining whether programming complaints should be included in or exempted from a unified complaint process, the Commission will have to address a number of issues, on which we offer the following recommendations: Revisions to the process should not fundamentally change the requirements regarding broadcast complaints, and the burden of proof should remain on the complainant in matters of alleged indecency and obscenity. Likewise, a revised process should not be an occasion to extend the Commission's regulatory authority to other types of broadcast content, nor to coerce or chill the speech of broadcasters. Finally, a revised process should not introduce new regulatory burdens on broadcasters, such as a requirement to tape all programming.

Respectfully submitted,

Patrick D. Maines, President

[9] *Community-Service Broadcasting of Mid-America v. FCC,* 593 F.2d 1102, 1105, 1122 (D.C. Cir. 1978) (en banc). *See generally* Robert Corn-Revere, "Indecency Wars Continue as FCC Issues Policy, Levies

Richard T. Kaplar, Vice President

THE MEDIA INSTITUTE
Suite 301
1000 Potomac Street, N.W.
Washington, DC 20007
Phone: 202-298-7512
Fax: 202-337-7092

May 29, 2002

Fines," in Richard T. Kaplar, ed., *The First Amendment and the Media - 2002* (Washington: The Media Institute, 2002) at 79-81.